IN THE UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF TEXAS
FORT WORTH DIVISION

IN RE:	§	
	§	
LANCE TODD WHITE & MICHELLE	§	
RENEE WHITE,	§	CASE NO. 401-42839-DML-13
Debtors.	§	
	§	

MEMORANDUM OPINION AND ORDER

Before the Court is the Application for Approval of Chapter 13 Attorney Fees (the "Application") filed in this case by the Ebert Law Offices, P.C. ("Applicant" or "Ebert"). This Court has jurisdiction over the Application pursuant to 28 U.S.C. §1334. This is a core proceeding within the meaning of 28 U.S.C. §157(b)(2).

The Application came before the Court on December 13, 2001, at which time Ebert had the opportunity to provide evidence and argument in support of the Application. At the Court's invitation, Ebert also transmitted a letter to the Court offering further support for the Application.[1] Though it is well established that it is an applicant's burden to justify the fees sought (*In re U.S. Golf Corp.,* 639 F.2d 1197 (5th Cir. 1982); *In re Huhn*, 145 B.R. 872 (W.D. Mich. 1992)), the Court has undertaken its own careful review of the entire record in this case, including the Application. The Court also takes notice of its unpublished Memorandum Opinion in *In re Cotton* and its unpublished

[1]The Court's purpose in requesting added information was to determine the return to unsecured creditors pursuant to the plan in this case. The original projected return was 22%, but the Final Plan, filed February 13, 2002, provides only 6.9% to unsecured creditors. The Court finds this particularly troubling in a case in which Debtors, in their schedules I and J, reflect charitable contributions of $450 per month and expenses for purchase and maintenance of a boat of $865 per month.

Memorandum Order in *In re Stow, et al.*[2] The Court also relies on its experience, *inter alia*, reviewing fees and court records in several hundred Chapter 13 cases in the past six months.

This Memorandum Opinion and Order constitutes the Court's findings of fact and conclusions of law. *See* FED. R. BANKR. P. 7052 and 9014.

I. Background

Applicant employs four attorneys[3] and two paralegals. The attorneys bill at rates ranging from $125 per hour (SKM) to $250 per hour (CDE and EBE). Both paralegals charge $60 per hour.

Applicant is experienced in consumer bankruptcy law. EBE has emphasized the practice area for almost 20 years. Lawyers from the firm have regularly represented consumer debtors and trustees and have individually served as Chapter 7 trustees. In the Court's opinion, Applicant is highly qualified in the area of consumer bankruptcy law. Its work product is consistent with that produced by other consumer bankruptcy practitioners in the Fort Worth - Dallas area.[4]

Unlike other practitioners in the area, Ebert has not adopted the "flat fee" (currently $1750 per case) charged by most consumer bankruptcy lawyers for representation of a Chapter 13 debtor.

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[2]Both of these decisions are available on the Court's website. *Cotton* involved another fee application by Ebert and *Stow* dealt with numerous applications for fees submitted by other counsel.

[3]E. Bruce Ebert ("EBE"), Carey D. Ebert ("CDE"), David B. Ebert ("DBE") and Stephanie K. Marshall ("SKM").

[4]The Court considers the Fort Worth-Dallas Consumer bankruptcy bar to be of exceptionally high quality.

While charging the flat fee does not prevent counsel from seeking additional compensation by application, this Court (and other courts in this district) generally consider most tasks required of debtor's counsel in a Chapter 13 case to be covered by the "flat fee."[5]

Ebert, however, bills its services by the hour, in increments of one-tenth of an hour, seeking compensation pursuant to applicable provisions of the Bankruptcy Code, Federal Rules of Bankruptcy Procedure, local rules and the U.S. Trustee's guidelines. It is on that basis that Ebert was employed in this case. *See* Debtors' Affidavit filed April 19, 2001.

According to the Application, Debtors sought relief under Chapter 13 on April 17, 2001. The need for filing was brought about by litigation between Debtor Lance White (a contract builder) and a dissatisfied client, Tony Tolbert ("Tolbert"). The filing of the Chapter 13 petition stopped the litigation. *See* 11 U.S.C. § 362(a)(1). During the case, the only consequence of Debtor White's dispute with Tolbert was an examination of White by Tolbert's counsel pursuant to FED. R. BANKR. P. 2004.[6]

The Application was filed on November 1, 2001, almost four months before the Debtors' Final Plan was filed. The Application reflects 33.4 hours of attorney time and 28.8 hours of paralegal time. Multiplying the hours reflected in the Application by applicable hourly rates results

[5]The letter submitted by Ebert to the Court following hearing of the Application dwelled on the inadequacy of the "flat fee."

[6]Interestingly, Tolbert filed his proof of claim four days late. The bar date was September 10, 2001, and Tolbert's claim (for $100,000) is file-stamped September 14. Thus, Tolbert may receive no payment under Debtors' plan, since late claims are automatically disallowed in Chapter 13. FED. R. BANKR. P. 3002(c) and 9006(b)(3) (there has been no suggestion Tolbert will – or could – assert an informal proof of claim. *See* 9 COLLIER ON BANKRUPTCY ¶ 3001.05 (15th ed rev. 2001)).

in a "lodestar" amount[7] of $8,165.50. Ebert, however, seeks fees in the amount of only $6,100. Ebert also asks for reimbursement of expenses in the amount of $241.90.

II. Discussion

A. Introduction

This Court has an independent duty to review fee applications. *See In re Temple Retirement Community, Inc.*, 97 B.R. 333, 336 (Bankr. W.D. Tex. 1989) and cases cited therein. The Code itself recognizes that the bankruptcy court may reduce requests for compensation even in the absence of objection. *See,* 11 U.S.C. § 330(a)(2). Here the Application seeks compensation equal to almost four times the "flat rate." The Court therefore feels it must subject the Application to particularly close scrutiny.

The ordinary approach this Court should follow in evaluating a fee application is to calculate the lodestar and then adjust the resulting number based upon factors found in case law (*see Johnson v. Georgia Highway Express, Inc.*, 488 F.2d 714 (5th Cir. 1974); *In re First Colonial Corp. of Amercia*, 544 F.2d 1291 (5th Cir), *cert. denied* 431 U.S. 904 (1977)), with particular emphasis upon those factors set out in 11 U.S.C. § 330(a)(3) and (4). In the instant case, the Court does not believe this methodology is practicable in assessing the Application.

B. Applicant's Lodestar

The first problem the Court has with the Application is that it has no confidence in Ebert's "lodestar." Not only is the Application rife with the same sort of questionable charges the Court

[7]The term "lodestar" is used by the courts to reflect time spent multiplied by hourly rates. *See* 3 COLLIER ON BANKRUPTCY ¶ 330.04[3][c] (15th ed. rev. 2001).

noted in *Cotton* (duplication, unnecessary work and excessive time spent on a given task), it also reflects a pattern that leads the Court to doubt seriously the accuracy of Ebert's timekeeping.[8]

Every proof of claim not only is reviewed by two Lawyers, DBE invariably takes .2 hour to review a proof of claim and, if other counsel reviews the claim, often another .2 hour is added. Every letter notifying a creditor of the Chapter 13 filing requires .4 hour of paralegal drafting time and .1 hour of attorney review and execution time.[9] Indeed, that pattern runs to other correspondence. Every incomplete call where a message is left requires .1 hour.

The timekeeping in this case is, overall, remarkably similar to that in *Cotton*. There, too, it required .2 hour for an attorney to review a proof of claim. It made no difference if the claim was a simple form with little or no back-up or a claim with extensive documentation appended to it. The Court cannot help but infer that a "cookie cutter" approach to billing time has been used by Applicant. In other words, the Application is composed of a series of standard charges. Under these circumstances, the Court concludes Applicant's "lodestar" is far too uncertain to provide a firm foundation for analysis of the compensation sought.

While the Court will not discard the lodestar or Ebert's recorded time, the Court cannot in good conscience give it the weight it ordinarily would be entitled to.[10] Rather, the Court will consider other factors – duplication, necessity or benefit of service, complexity of the case, and

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[8]The Court expressed the same concern in *Cotton.*

[9] Ebert in this case goes one better than in *Cotton,* in which a single letter was apparently sent to all creditors advising of the filing and the automatic stay.

[10]The lodestar analysis merely provides a starting point for the determination of appropriate fees. *See In re Public Service Co. of New Hampshire*, 86 B.R. 7, 11 (Bankr. N.D. N.H. 1988).

customary compensation[11] – as the more critical determiners of appropriate compensation in this case.

C. Analysis of Application

The Court does not propose to do an analysis of every time entry as it did in *Cotton*. As it has determined to discount the role of Applicant's lodestar in calculating the award of compensation, examples of the problems noted in *Cotton* will suffice for analysis of earned fees in this case.

Beginning with duplication, on 4/11/01, both CDE and DBE billed for reviewing the file and preliminary plan and approving the latter for execution. On 5/2/01 both CDE and DBE charged for receiving a notice of dismissal of the *Tolbert* suit. On 5/29/01 and again on 5/30/01 DBE charged .2 hour for reviewing a claim by American Express. The claim was filed on a simple form with a six line accounting attached.

The Application also includes time entries that the Court considers not billable. In particular, telephone calls in which the other party was not reached were billed at .1 or even .2 hour (e.g. paralegal, 6/12/01, 6/20/01 (.2 hour), 7/18/01, 7/19/01; DBE 7/31/01 (.2 hour)). On 5/3/01 .2 hour paralegal time was spent faxing a copy of the plan. Finally, DBE charged .5 hour for a response to Tolbert's motion under Rule 2004 seeking examination of Debtor Lance White. The response was never filed.

There are many instances of excessive time spent on a task. On 4/19/01 eight letters were sent to creditors informing them of the filing of the case and the imposition of the automatic stay. For each letter (though there could have been little difference among them other than the addressee)

[11]These are the factors set out in 11 U.S.C. § 330. The last refers to customary compensation "in cases other than cases under this title." However, case law (and the Application; p.3, ¶ III C) suggests this Court consider whether the fee charged is customary in this geographical area. *See Johnson*, 488 F.2d at 718; *First Colonial,* 544 F.2d at 1298-99; *see also In re Global Intl Airways Corp.*, 38 B.R. 440, 443 (Bankr. W.D. Mo. 1984).

a paralegal charged .4 hour and DBE spent .1 hour reviewing and executing. Based on these highly questionable time entries, the Court also questions the 3.3 hours spent by EBE (almost all the time spent by EBE on the case) preparing for and attending Debtors' initial § 341 meeting.

D. The Complexity of the Case

Judged by the file in the case and the nature of the time entries on the Application, this case has not proven difficult or complex. Other than a brief skirmish with the IRS and the Rule 2004 examination, the case was typical of (if not less complicated than) most Chapter 13 cases seen by this Court. No matter has been litigated. There has been one motion to dismiss filed by the Standing Chapter 13 Trustee (after the Application was filed) that appears to have been disposed of without difficulty. One objection to the plan was made by a taxing authority, and was resolved without litigation. There were two motions for relief from stay. One (involving one of the Debtors' cars) was resolved by an agreed order. The other, apparently involving non-exempt real property, was not defended, and a default order was entered.[12]

In sum, this case would have been handled for the "flat fee" or, perhaps, a little more by any other consumer attorney in the area.[13] Certainly the file reflects nothing that would justify fees of the magnitude sought by Ebert. The Application does not suggest that the clients were particularly difficult – compared to *Cotton*. In fact, this case appears from all the evidence available to the Court to have gone remarkably smoothly.

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[12]In fairness to Applicant, no time was charged in connection with this motion except for .2 hour billed by DBE for reviewing the default order.

[13]See Exhibit A to the Court's Memorandum Order in *In re Stow, et al.* The only task performed by Applicant that (arguably) would be outside the scope of the "flat fee" was handling of the Rule 2004 motion.

III. Conclusion

Denying fees to counsel is not a joyous task for a court. Judges often have experienced the sour taste of fees denied prior to taking the bench.

On the other hand, the Court cannot let Ebert's Application pass. The question is how to calculate fair compensation.

If this case were subject to the "flat fee", the Court would not award (including the "flat fee") more than $1,950. Because the "flat fee" does not apply here, however, the Court feels compelled to give some – however little – weight to the lodestar derived from the Application. Thus the Court will authorize fees in the amount of $2,500 and expenses as applied for, for a total of $2,741.00. Since Debtors paid Applicant $885.00 prior to commencement of the case, $1,856 remains owing.

IV. Order

For the foregoing reasons, it is

ORDERED that Ebert Law Offices, P.C., be, and they hereby are, allowed total fees in this case of $2,500 and authorized reimbursement of expenses of $241.00, for a total of $2,741.00; and it is further

ORDERED that, said firm having received $885.00 from Debtors prior to commencement of the case, the Standing Chapter 13 Trustee be, and hereby is, authorized and directed to pay to said firm through Debtors' plan $1,856.00; and it is further

ORDERED that the compensation sought by the Application be, and the same hereby is, otherwise disallowed; and it is further

ORDERED that, notwithstanding any agreement between said firm and Debtors, said firm shall not attempt to collect additional fees from Debtors absent further order of the Court; and it is further

ORDERED that the Standing Chapter 13 Trustee take action to modify Debtors' Chapter 13 plan to increase distributions to unsecured creditors at least by that amount by which said firm's fees are hereby reduced; and it is further

ORDERED that entry of this order shall be without prejudice to reconsideration of the amounts herein awarded in the event Ebert Law Offices, P.C. should seek further compensation in this case or not perform its ongoing duties in this case; and it is further

ORDERED that entry of this order shall be without prejudice to such firm seeking additional fees for future services in this case.

SIGNED this the 22nd day of March, 2002.

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DENNIS MICHAEL LYNN
UNITED STATES BANKRUPTCY JUDGE